Staffing Network Holdings, LLC *and* Griselda Barrera. Case 13–CA–105031

February 4, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On July 17, 2014, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Staffing Network Holdings, LLC, Itasca, Illinois, its officers, agents, successors, and assigns, shall take the actions set in the Order as modified.

1. Substitute the following for paragraph 2(g).

"(g) Within 14 days after service by the Region, post at its facilities in Itasca, Illinois, and its ReaderLink facility in Romeoville, Illinois, copies of the attached notice marked 'Appendix.'[21] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by terminating Griselda Barrera, we agree with the judge that under *Atlantic Steel Co.*, 245 NLRB 814 (1979), Barrera did not engage in any conduct that would cause her to lose the protection of the Act.

Contrary to the judge and our colleague, we find that the fourth factor of the *Atlantic Steel* test, whether the outburst was provoked by an unfair labor practice, weighs in favor of protection. Specifically, we find that the Respondent's unlawful threats of termination (rather than the discharge of Barrera's coworker, relied on by the judge) motivated Barrera to briefly refuse to leave work when asked to do so and state that she had done nothing wrong. See *Goya Foods, Inc.*, 356 NLRB No. 73 (2011). We further find, however, that even assuming this factor weighed against protection, a finding of a violation is still warranted, because the other three *Atlantic Steel* factors weigh in favor of protection, as the judge found. We also agree with the judge that an analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is not appropriate in this case, but even assuming *Wright Line* applied, a finding of a violation would be warranted for the reasons set forth in the judge's decision.

In adopting the judge's finding that the Respondent's statement that Barrera could not return to work conveyed that she was discharged, we do not rely on *Action Carting Environmental Services,* 354 NLRB 732 (2009), cited by the judge. Instead, we rely on *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 846–847 (2001).

In affirming the judge's recommended tax compensation and Social Security Administration reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We affirm the judge's decision not to order a Spanish-language notice posting, but do not rely on *First Student, Inc.*, 359 NLRB No. 12 (2012), cited by the judge.

In finding that Andy Vega unlawfully threatened Barrera, Member Johnson does not rely on Vega's asking Barrera whether she was fine, but only on the threat that followed. See his concurrence in *Greater Omaha Packing Co.,* 360 NLRB No. 62, slip op. at 2 fn. 6 (2014) (emphasizing the need to afford employers the opportunity to exchange views with employees on terms and conditions of employment).

In finding the unlawful discharge, Member Johnson notes that the judge did not clarify what purported misconduct of Barrera's was the subject of her *Atlantic Steel* analysis. The judge did not credit Supervisor Andy Vega's testimony that Barrera was rude and refused his instruction to go back to work. His colleagues point to Barrera's later refusal to go home when directed, but that occurred after Vega told her to go, and the Respondent does not contend that it took adverse action against her because of it.

As for the *Atlantic Steel* analysis itself, Member Johnson agrees that the first two factors weigh strongly in favor of protection. As for Barrera's refusal to leave when directed (and assuming that the judge was looking at that), Member Johnson disagrees with the analysis in *Goya Foods* insofar as it puts too much importance on the brevity of insubordination to an employer's directive (particularly a directive for the employee to leave). More decisive is the employer's reaction to the potential insubordination. Here, Vega told Barrera to go home, she refused and said she had done nothing wrong, and Vega angrily said, "Let's see if you're not leaving." After the others defended Barrera, however, Vega did not insist that she leave. He simply walked off. It could have reasonably appeared that he was dropping the matter. When Monica Amaya then came to repeat the instruction, Barrera readily complied. Based on this and the fact that Barrera's refusal was not particularly disrespectful or disruptive, Member Johnson finds that this factor weighs only weakly toward a loss of protection. Finally, contrary to his colleagues, he does not disturb the judge's finding that the fourth (provocation) factor properly relates to the discharge of employee "Juan" and does not weigh in favor of protection. All told, however, he agrees that none of Barrera's conduct cost her the Act's protection.

[2] We shall modify the judge's recommended Order in accordance with our decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010), and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 2012."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 4, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected, concerted activities protected under Section 7 of the Act.

WE WILL NOT threaten you with discharge for engaging in protected, concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Griselda Barrera full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Griselda Barrera whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Griselda Barrera for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Griselda Barrera, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

STAFFING NETWORK HOLDINGS, LLC

The Board's decision can be found at www.nlrb.gov/case/13-CA-105031 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Sylvia Taylor, Esq., for the General Counsel.
Amanda Sonneborn, Esq., Kerry Mohan, Esq., and *Giselle Donado, Esq.,* for the Respondent.
Christopher Williams, Esq. and *Alvar Ayala, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Chicago, Illinois, on February 12 and 13, 2014. Griselda Barrera, an individual, filed the charge on May 13, 2013, and a first amended charge on September 16, 2013, and the General Counsel issued the complaint on October 29, 2013.[1] (GC Exhs. 1(a), (c), (e).) The complaint alleges that Staffing Network Holdings, LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening to terminate employees because they engaged in protected concerted activity, and by terminating Charging Party Griselda Barrera, an employee of Respondent, because she engaged in protected concerted activity. (GC Exh. 1(e).) Respondent timely filed an answer and amended answer to the complaint denying the alleged violations of the Act and asserting eight affirmative defenses. (GC Exhs. 1(g) and (k).) The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,[2] including my own observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Staffing Network Holdings, LLC, a limited liability corporation, provides long-term and temporary assignment of technical, professional, and light industrial services to a variety of employers from its facility in Itasca, Illinois, where it annually performs services valued in excess of $50,000 in States other than the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations and Management Structure

Respondent operates a staffing agency. Some of its locations are freestanding (branch locations) and others are within the premises of another employer (embedded locations). One such embedded location is at a facility called ReaderLink in Romeoville, Illinois. The General Counsel does not allege that Respondent and ReaderLink are joint employers or a single employer under the Act. Respondent provides 80 employees who work as pickers and stockers, an onsite manger, and a staffing assistant to ReaderLink. The pickers work side by side on a production line with radio headsets, placing books into boxes and sending them down the line. Stockers, who work near the pickers, ensure that the pickers are provided with a sufficient supply of books to pick.

Respondent's clients may wish to terminate or remove one of Respondent's employees from its employ. Respondent uses the acronym DNR (do not return) to describe such situations. Thus, when an employee is told not to return to a client-employer's premises, Respondent describes this situation by stating that the employee has been "DNR'd."

In November and December 2012, Andy Vega was Respondent's onsite supervisor at ReaderLink. Esther Rodriguez is Respondent's operations manager for ReaderLink and other accounts; in the fall of 2012 she visited ReaderLink about two or three times per week. Cecilia Zuniga is Respondent's human resources manager. Respondent admits, and I find, that Vega, Rodriguez, and Zuniga are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exhs. 1(g) and (k).)

At the time of the events giving rise to this case, Monica Amaya was Respondent's staffing assistant at ReaderLink; she reported to Vega. (Tr. 217–218.) Her duties included assisting Vega with payroll and administrative duties. Id. I find that Amaya is an agent of Respondent. Agency may involve express or apparent authority. The Board applies common-law principles of agency in determining whether an employee is acting with apparent authority on behalf of an employer when that employee makes a particular statement or takes a particular action. *Pan-Oston Co.,* 336 NLRB 305 (2001), citing *Cooper Industries,* 328 NLRB 145 (1999). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the act in question. *Pan-Oston Co.,* 336 NLRB at 306, citing *Southern Bag Corp.,* 315 NLRB 725 (1994). Agency status can be established when an employee is held out as a conduit for transmitting information to employees. *D&F Industries,* 339 NLRB 618, 619 (2003); *Hausner Hard-Chrome of KY,* 326 NLRB 426, 428 (1998). As set forth more fully below, Amaya relayed various messages from Vega to Barrera, including the messages sending Barrera home and

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Br." for Respondent's Brief; and "GC Br." for the General Counsel's Brief. The Charging Party did not file a brief.

[2] On March 31, 2014, after the General Counsel and Respondent moved to correct the transcript, I issued an Order Correcting Transcript. The Order to Correct Transcript is in the record as ALJ Exh. 2. Pursuant to this Order, the transcript is corrected as follows: Tr. 86, L. 18: substitute "By Ms. Taylor" for "By Ms. Sonneborn"; Tr. 97, L. 21: substitute "breaks" for "brakes"; Tr. 103, L. 19: substitute "Ms. Sonneborn" for "Ms. Taylor"; Tr. 126, L. 24: substitute "Ms. Sonneborn" for "Ms. Taylor"; Tr. 128, L. 8: substitute "Ms. Sonneborn" for "Ms. Taylor"; Tr. 146, L. 3: substitute "hire" for "higher"; Tr. 221, L. 18: substitute "Ryan" for "Brian"; Tr. 222, L. 1: substitute "Ryan" for "Brian"; Tr. 258, LL. 8–10: substitute "pinche joto, maricon, te voy a partir tu madre, and eres un puto" for "[Spanish word], [Spanish word], [Spanish word]."

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

advising her not to return to work. I find that in so doing Amaya is an agent of Respondent within the meaning of Section 2(13) of the Act.

B. Griselda Barrera's Employment with Respondent

Griselda Barrera was employed by Respondent from about 2004 until she was discharged by Respondent on November 15, 2012.[4] (Tr. 13.) Barrera's only assignment while employed by Respondent was at ReaderLink, where she worked as a picker. (Tr. 14.) Her supervisor was Andy Vega. (Tr. 15–16.) Prior to her termination, Barrera had never been disciplined for insubordination or other issues related to her work performance.[5]

C. The Events of November 15

On November 15, 2012,[6] the pickers and stockers at ReaderLink were trying to fulfill a large book order. (Tr. 17, 71.) Vega testified that he was asked to speak to the stockers by Mari Perez, a supervisor employed by ReaderLink, because the stockers were not working quickly enough. (Tr. 241.) Accordingly, Vega spoke with two stockers that morning.[7]

One of the stockers, a man identified only as Juan, stated that he would not work faster for $8.25 [an hour]. (Tr. 243.) Vega testified that he was shocked and taken aback by this response and that Perez told Vega to send Juan home. (Id.) Vega testified that he told Juan he couldn't accommodate him elsewhere, said he was sorry, and shook Juan's hand. (Tr. 245.) Juan allegedly replied, "OK, that's fine. I'll go home."[8] (Tr. 243.)

The decision to send Juan home caused an immediate reaction by the pickers. Shortly after seeing Juan leave, the pickers spoke to Vega. Barrera and others, including Olga Gutierrez, told Vega that the line wasn't moving because the stocker (Juan) was new and couldn't keep up with the work. (Tr. 19, 72.) Vega replied that Juan was being sent home because of his attitude and because he couldn't keep up with the work. (Tr. 18–19, 72.) Barrera, Gutierrez, and others told Vega that this wasn't fair. (Tr. 19, 73.) Vega replied that it wasn't the pickers' matter to deal with and that they should get back to work. (Id.) Vega further stated that he could send the pickers home for their attitude. (Tr. 19.) Vega then left the area.

A short time later Vega, appearing angry, returned to the pickers' work area and asked Barrera if everything was fine. (Tr. 20–21, 74.) Vega told Barrera that if she had an issue, he could send her home. (Tr. 21.) Barrera asked Vega if he was threatening her and stated that she could send a letter to the Department of Human Rights. (Tr. 21, 31.) Vega then told Barrera to take her things and go home. (Tr. 21, 74.) Barrera refused, stating that she had done nothing wrong. (Id.) Vega then became angrier, pointed at Barrera, and stated, "Let's see if you're not leaving." (Tr. 21.) Gutierrez and others came to Barrera's defense, stating she had done nothing wrong. (Tr. 75.) Although Vega appeared angry and raised his voice during this exchange, Barrera did not raise her voice in response. (Tr. 21–22, 74.) Vega again left the area.[9]

Vega returned to the office and asked Amaya to send Barrera home. (Tr. 219.) Amaya then went to the pickers' work area. (Tr. 23, 75, 219.) Amaya told Barrera to please take her things and leave because if she did not, Vega would call security and have her escorted out. (Tr. 23, 75–76, 219.) Other workers came over and spoke to Amaya supporting Barrera. (Tr. 24, 76, 227–228.) The other workers told Amaya that Vega had been rude. (Id.) Amaya stated that there had been a lot of complaints about Vega, but that there was nothing she could do.[10] (Tr. 25.) Barrera and Amaya left the work area and Barrera turned in her radio. (Tr. 219.) Amaya then escorted Barrera to the cafeteria, where she waited for her ride home.[11]

Barrera was initially told by Amaya to go home for the day. I credit the testimony of Amaya and Gutierrez, and Barrera's affidavit testimony in making this finding. Events that transpired later that day, however, lead me to the conclusion that Barrera was discharged. Barrera and Amaya agree that Barrera sent a text message to Amaya on the evening of November 15 and asked if she [Barrera] could come back to work the next

[4] I find Respondent's claim that it did not discharge Charging Party Barrera to be without merit for reasons discussed in greater detail herein.

[5] I decline to discredit Barrera's testimony based upon the contradiction between her testimony at Tr. 37 and R. Exh. 1. Barrera testified that she had never been disciplined, but when confronted with a disciplinary action form she admitted receiving it. (Id.) However, Barrera did not believe that this form represented "discipline" because it was not related to her work. (Id.) Instead, Barrera was written up for punching in more than 10 minutes before her shift started. (R. Exh. 1.) I do not find this contradiction material and, therefore, I decline to discredit Barrera as a witness.

[6] All dates are in 2012, unless otherwise indicated.

[7] Neither of the two stockers, nor Perez, was called as witnesses at the trial.

[8] This rather illogical testimony, along with other examples cited below, form the basis for my discrediting of Vega as a witness. It defies credulity that Vega replied to Juan in this manner. Vega's testimony that he told Juan he "couldn't accommodate him," shook Juan's hand, and said he was sorry stands in stark contrast to Vega's testimony that he was shocked and taken aback by Juan's statement that he would not work faster.

[9] I do not credit Vega's version of his exchange with Barrera. Vega testified that Barrera angrily referred to him as a secretary and a nobody, and threatened to call immigration and report him. (Tr. 248.) His testimony was contradicted by that of Barrera, Gutierrez, and Amaya. Barrera denied that she told Vega that he was nothing more than a secretary, that he was a nobody, or that she [Barrera] was going to call immigration and have him deported. (Tr. 44.) Gutierrez did not mention any such comments in her testimony. Amaya testified that she could not remember whether Vega mentioned any such comments to her. (Tr. 230–231.) More importantly, Vega's testimony that Barrera made these statements to him is contradicted by R. Exhs. 8 and 10, which were prepared by Vega and Amaya shortly after the events in question. These contradictions, as well as others detailed elsewhere in this decision, have led me to the conclusion that Vega's testimony was not credible.

[10] When questioned about this on cross-examination, Amaya did not specifically deny making this statement. Instead, she testified that she remembered the workers making complaints about Vega, but could not remember if she agreed with them. (Tr. 227–228.) Therefore, I credit the testimony of Barrera on this point.

[11] I credit the testimony of Barrera that she asked Amaya to wait in the cafeteria. (Tr. 39.) Barrera testified that she gets a ride to work and had to wait for her ride. (Id.) Barrera had no reason to fabricate this point. To the extent that this testimony contradicts that of Amaya (Tr. 219), I credit Barrera.

day. (Tr. 26, 219.) Barrera and Amaya further agree that Amaya advised Barrera that she needed to come to the office and speak to Vega about what had happened that day. (Id.) I credit Barrera's further testimony that Amaya stated that she [Barrera] should not return to work.[12] (Tr. 26.) The text messages were not produced at the trial.

D. Events Following Barrera's Discharge

Barrera sought State unemployment benefits after her discharge. (R. Exh. 8; Tr. 57.) In its statement to the Illinois Department of Employment Security (IDES), Respondent indicated that Barrera had been involuntarily separated from employment. (R. Exh. 8.) In its narrative explanation, Respondent stated that Barrera had disrupted production by "getting the ladies in the line worked up" about "standing up against . . . the injustice we were committing."[13] (R. Exh. 8.) However, Respondent also indicated that Barrera would be "considered for future assignments" with any account other than ReaderLink. (Id.) I find that this statement indicates that Barrera is eligible for rehire. As a defense to Barrera's unemployment claim, Respondent did not allege that she had not been terminated. (Id.) Additionally, Respondent did not indicate that Barrera was insubordinate to Vega in its statement to IDES. During Barrera's unemployment hearing, Respondent asserted that she was discharged because of her attitude. (GC Exh. 4; Tr. 60.) Barrera was ultimately granted State unemployment benefits. (GC Exh. 4.)

Barrera also filed a claim against Respondent with the Illinois Department of Human Rights (IDHR). (R. Exh. 2.) In her claim, Barrera alleged discrimination by Respondent based upon her ancestry and age.[14] (Id.; Tr. 51.)

Later, Respondent scheduled a meeting with Barrera. (Tr. 46, 131–132.) Zuniga and Rodriguez were to attend the meeting on behalf of Respondent. (R. Exh. 12; Tr. 132, 133, 188.) Respondent's witnesses testified that they were going to offer Barrera a position at a different facility at this meeting. (Tr. 132, 153.) However, Respondent's Exhibit 9 describes this meeting only as an "investigative interview." Barrera was never told that she would be offered alternate employment and never received an offer of other employment from Respondent. (Tr. 47, 154.) Barrera canceled the meeting because she was ill and never called to reschedule.[15] (Tr. 47.)

In December, Barrera and her son came to ReaderLink. Barrera asked to speak with Soledad Santiago, an official with ReaderLink's human resources department. (Tr. 48, 221, 252.) Instead, Vega and Amaya came to see Barrera. (Tr. 49.) At no time, did either Vega or Amaya indicate that Barrera could return to work or could seek an assignment at a different facility. Barrera and her son left without speaking to Santiago, who was unavailable.

At some point, Vega allegedly received telephone messages from Barrera's son, who was not called as a witness at the trial. Although Vega never talked to him, Barrera's son allegedly left threatening messages laced with profanity for Vega. (R. Exhs. 9, 10.) Transcripts or recordings of these messages were not produced at the trial. Additionally, there was no evidence adduced that Barrera's son left these messages while acting with Barrera's authority.

Rodriguez and Vega held a meeting with the other pickers at ReaderLink following Barrera's discharge. The lawfulness of any statements made at the meeting is not before me.

In support of Vega's testimony that Barrera was DNR'd from ReaderLink, Respondent's counsel sought to admit a list of employees who had been DNR'd from ReaderLink as an exhibit. (R. Exh. 7; Tr. 119.) I denied admission of the exhibit because it was prepared in anticipation of litigation[16] and, to the

[12] I do not credit Vega's testimony about responding to the text message. Initially, I note that Vega and Amaya disagree about the circumstances surrounding their conversation; Amaya testified that she called Vega to discuss Barrera's message and Vega testified that he spoke to Amaya face-to-face at work. (Tr. 219–220; 250–251.) Additionally, they disagree about the content of their discussion. Amaya testified that Vega told her to tell Barrera that she either had to come to the office or call Vega to "talk about what happened." (Tr. 220.) Vega testified that he told Amaya that, "before we put her back on the schedule she would need to talk to me." (Tr. 250.) Not only does Vega's testimony contradict Amaya's on this point, it also contradicts his own testimony that Barrera could not return to ReaderLink and his statement to the Illinois Department of Employment Security that Barrera had been DNR'd from ReaderLink. (R. Exh. 8, p. 2; Tr. 251.) Furthermore, I credit Amaya's testimony about her response to Barrera's text message only to the extent that it is corroborated by Barrera.

[13] Respondent made an identical narrative statement regarding the events surrounding Barrera's discharge in its computer system. (R. Exh. 15.)

[14] At trial, Respondent's counsel sought to admit the IDHR notice of dismissal and investigator's report. (R. Exh. 3.) I rejected this exhibit. Respondent's counsel indicated that she intended to impeach Barrera with the document. (Tr. 53.) The document contains investigative notes and conclusions of an IDHR investigator. It does not contain any statements signed and sworn to by Barrera. The investigator was not subpoenaed as a witness for the trial. Therefore, I reaffirm my ruling that this document was both inadmissible as hearsay and an improper document with which to impeach Barrera, as it could not be corroborated. Respondent did not raise this issue in its brief.

[15] There is no evidence that Barrera was told to call Respondent for an assignment with another of Respondent's clients. Furthermore, Respondent's employment application is silent as to what an employee should do if he or she is DNR'd from a client site. (R. Exh. 5.) The application does, however, indicate that receiving a DNR is grounds for termination. (Id.)

[16] Reports and documents prepared in the ordinary course of business are generally presumed to be reliable and trustworthy for two reasons: businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be accurate and none to be deceitful; and the routine and habitual patterns of creation lend reliability to business records." *U.S. v. Blackburn,* 992 F.2d 666, 670 (7th Cir.1993) (citing *U.S. v. Rich,* 580 F.2d 929, 938 (9th Cir.1978)). The absence of trustworthiness of a document is clear when a report is prepared in anticipation of litigation because the document is not for the systematic conduct and operation of a business, but for the primary purpose of litigating. *Certain Underwriters at Lloyd's, London v. Sinkovich,* 232 F.3d 200, 205 (4th Cir. 2000).

extent it constitutes a summary, no underlying documents (electronic or otherwise) were produced by which the General Counsel could verify the exhibit's accuracy. (Tr. 119, 122.) Furthermore, the witness through whom Respondent's counsel was seeking to admit the document did not prepare it and a proper foundation was not laid to establish that the document was a business record. (Tr. 120; 124–126.) Therefore, I reaffirm my ruling denying admission of Respondent's Exhibit 7.[17]

Discussion and Analysis

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

I did not find Vega to be a credible witness. Numerous examples of his contradictory and self-serving testimony are given elsewhere in this decision. He delivered his testimony in an often rambling and narrative fashion. (Tr. 243–246, 246–247.) Moreover, his testimony was contradicted by that of other witnesses and documentary evidence.

Vega's testimony diverged from that of Amaya regarding Amaya's escorting Barrera out of the pickers' work area. Amaya simply testified that Barrera gave Amaya her [Barrera's] radio and then she went home. (Tr. 219.) Vega, however, testified that he encountered Barrera and Amaya as they were leaving the pickers' work area. (Tr. 250.) He went on to state that he asked Barrera for her radio headset and Barrera refused to give it to him. (Id.) He then testified that he and Amaya followed Barrera to the control room, where she left her radio headset and left. (Id.) Neither Amaya nor Barrera testified that they encountered Vega after leaving the pickers' work area. Additionally, neither Amaya nor Barrera testified to the exchange between Vega and Barrera regarding the radio headset. This contradiction, along with numerous others noted in this decision, establishes that Vega's testimony was unreliable.

Vega also testified that Barrera asked Amaya if she could apologize to him after he sent Amaya to the pickers' work area. (Tr. 249.) During this conversation, Vega allegedly told Amaya that Barrera did not have to apologize because she had done nothing wrong. (Id.) Neither Amaya nor Barrera mentioned this alleged apology attempt during their testimony. In addition, Vega's testimony is inherently incredible because Vega testified that he sent Barrera home for insubordination. If Barrera was, in fact, insubordinate, it is implausible to believe that Vega would say she had done nothing wrong.

Finally, Vega's testimony was contradicted by the documentary evidence in this case. For example, Vega's testimony differs from Respondent's version of events as set forth in its position statement. (GC Exh. 2.) In addition, his testimony differs from his version of events contained in Respondent's computer system and the identical version of events as provided to IDES. (GC Exh. 10; R. Exhs. 8 and 15.) These contradictions support my finding that Vega did not provide credible testimony. Therefore, for the reasons contained in this decision, as well as my review of all of the evidence in this case, I decline to credit Vega's testimony.

I do not credit Amaya's testimony where it conflicts with that of other witnesses. Amaya seemed unsure when giving her testimony. Instead of denying numerous statements attributed to her, Amaya answered that she did not remember whether or not she made the statements. (Tr. 227, 228–232.) For example, Amaya did not remember whether: she agreed with the pickers' complaints about Vega; she thought it was unfair that Barrera was sent home; Vega told her that Barrera had threatened to call immigration; or Vega told her that Barrera had allegedly referred to him as a secretary.

Furthermore, when asked about the same incident a second time, Amaya appeared to embellish her testimony. When initially asked about Barrera's December visit to ReaderLink, Amaya testified that Barrera told her that she [Barrera] wanted to see someone from ReaderLink's human resources department and that she [Amaya] told Barrera that Santiago was not available. (Tr. 221.) When asked again a few seconds later about this incident, Amaya added further details about the encounter (that she [Amaya] went to the office to page Soledad Santiago, that Santiago did not respond, and that she [Amaya] returned to the front of the building to tell Barrera that Santiago was not available). (Tr. 221–222.) Therefore, where it conflicts with the testimony of other witnesses, I have not credited the testimony of Amaya.

Gaspar, Zuniga, and Rodriguez had little to offer in the way of relevant evidence. None of them witnessed any of the events of November 15. (Tr. 104, 127, 180.)

Zuniga provided little relevant evidence and I generally do not credit her testimony. Zuniga's testimony that Vega did not have the authority to fire or DNR employees seemed farfetched. (Tr. 118.) Vega was the highest ranking employee of Respondent present on a daily basis at ReaderLink. Vega himself did not offer any testimony concerning his authority to discharge employees. Respondent did not raise this defense in any of its pretrial statements or filings and raised it for the first time at the hearing. In any event, the employees believed that Vega had the authority to do so and, in reality, he terminated Barrera. I have not credited Zuniga's testimony, which was not corroborated by any documentary evidence or other witnesses, on this point.

[17] Respondent did not address my refusal to admit its exhibit in its brief.

Zuniga's testimony failed to establish Respondent's theory that Barrera was never terminated. Zuniga testified that Respondent scheduled a meeting with Barrera to offer her alternate employment. (Tr. 131.) Although Zuniga testified that the purpose of the meeting with Barrera was to offer her another position with a different client, she described the meeting as an "investigative interview" in an email to Rodriguez. (R. Exh. 9.) In another email message, Zuniga stated that Barrera requested the meeting to address her [Barrera's] concerns. (GC Exh. 11.) Zuniga's testimony regarding the purpose of the meeting with Barrera was refuted by the documentary evidence; neither of the email messages indicates that Respondent intended to offer Barrera alternate employ-ment.

I further decline to credit the testimony of Rodriguez. Her knowledge of the events of November 15 came solely from an alleged telephone conversation with Vega after Barrera was discharged. Vega did not testify to having any such conversation with Rodriguez. In addition, Rodriguez did not seem at all aware of Amaya's involvement in Barrera's discharge. She attributed many of the statements made by Amaya on November 15 to Vega. For example, Rodriguez testified that Vega allegedly told Rodriguez that it was he who told Barrera that security would remove her if she would not leave. (Tr. 181.) Additionally, on cross-examination, Rodriguez did not always answer the question that was posed. For example, when asked by counsel for the General Counsel to explain Respondent's procedure for firing employees, Rodriguez responded, "We don't fire employees too often." (Tr. 198.) Despite her position as operations manager for Respondent's onsite division, which includes ReaderLink, and as a superior to Vega, she claimed not to know whether Vega had authority to discharge employees. (Tr. 198.) Therefore, I have not credited the testimony of Rodriguez.

Conversely, I find the testimony of Barrera both believable and reliable. She testified in a steady and forthright manner. Her testimony was corroborated to a great extent by that of both Gutierrez and Amaya. However, I have not credited her testimony that Amaya initially told her that she could not return to work on November 15 to the extent it is contradicted by her earlier affidavit testimony. Although Barrera's testimony contained a few minor contradictions, and she once sparred with counsel for Respondent on cross-examination, I do not find this detracts from her overall credibility. Her testimony was logical and consistent and she did not appear to waver on cross-examination. Therefore, based upon Barrera's consistent testimony and demeanor on the witness stand, I credit her testimony except where otherwise noted.

I further decline to discredit Barrera, as suggested by Respondent, because she filed ancestry and age discrimination claims with IDHR. The Board has found that the filing of an EEOC charge is not inconsistent with a claim of discriminatory discharge under the Act. *Gallup, Inc.,* 349 NLRB 1213, 1249 (2007). In *Gallup, Inc.,* the Board noted that there can be multiple reasons for a discharge, and because one or more reasons may be covered by different statutes, multiple charges covering those suspected reasons are not inconsistent. Id. Accordingly, I decline to find that Barrera's IDHR charge creates an inconsistency in her testimony requiring that she be discredited.

I credit Gutierrez' testimony. Gutierrez admitted that she has a weak memory due to a medical condition. (Tr. 84.) However, her testimony did not appear embellished or fabricated. She did not waver in her testimony on cross-examination. Her testimony is largely corroborated by that of Barrera, who I have found to be a credible witness. She testified regarding the events surrounding Barrera's exchanges with Vega and Amaya on November 15, and her testimony contained sufficient detail such that I credit it.

I disagree with counsel for the General Counsel that the testimony of Gutierrez or Gaspar is entitled to be deemed "inherently credible." (GC Br. 18.) Under Board law, current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Advocate South Suburban Hospital,* 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries,* 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996); see also *American Wire Products,* 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Although Gutierrez and Gaspar are eligible for future assignments, they are not current employees of Respondent. Instead, I find that they are former employees of Respondent who are eligible for rehire. The General Counsel has not cited any cases, and I could not find any, supporting the proposition that the testimony of temporary workers not currently employed by a respondent staffing agency, but eligible to seek further assignments, should be assigned any enhanced credibility.[18] It is too speculative to believe that Gutierrez or Gaspar were testifying against their own pecuniary interests, especially given that neither testified that they plan to seek assignments from Respondent in the future.

B. Respondent Twice Unlawfully Threatens Employees with Termination

The General Counsel's complaint alleges that two threats of termination were made by Vega on about November 15. (GC Exh. 1(e), par. IV.) Although the complaint does not further elucidate the contents of these threats, the brief of counsel for the General Counsel indicates that these threats were made: (1) during a conversation with the pickers immediately after Juan was sent home, when Vega allegedly said he could send the pickers home for having the same attitude as Juan, and; (2) when Vega returned to the production line a short time later, asked Barrera if she was fine, and said he could send her home. (GC Br. 7–8.)

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection.

[18] The cases cited by the General Counsel are distinguishable from this case because they all deal with the credibility of current employees of a respondent. As I have found, Gaspar and Gutierrez are not current employees of Respondent.

Section 8(a)(1) of the Act makes it unlawful for an employer, via statements or conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Yoshi's Japanese Restaurant & Jazz Home,* 330 NLRB 1339, 1339 fn. 3 (2000). The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. Id.; see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

The evidence clearly establishes that Barrera and the other pickers protested Vega's treatment of Juan to Vega on November 15. Unrepresented employees who engage in a peaceful work stoppage to protest the termination of a fellow employee are engaged in protected concerted activity. *Robbins Engineering,* 311 NLRB 1079, 1083 (1993). Under Board law, even a single employee's complaint about the treatment or discipline of another constitutes concerted activity. *The Loft,* 277 NLRB 1444, 465 (1986) (one employee's complaint to employer about employer's handling of problem is concerted activity); *Richboro Community Mental Health Council,* 242 NLRB 1267 (1979) (letter of single employee protesting the discharge of another employee is concerted activity). Even if I were to find, as suggested by Respondent, that Barrera acted alone in protesting Juan's discharge, her actions would still constitute protected concerted activity. In this instance, Barrera voiced a concern about Vega's decision to discharge Juan. I have found that other employees, including Olga Gutierrez, joined in Barrera's protest. Thus, I find that Barrera was engaged in protected, concerted activity when she complained about Juan's discharge. I further find that Respondent violated Section 8(a)(1) of the Act by twice threatening Barrera with discharge for engaging in this activity.

I find that Vega's statement that he could send the pickers home for having the same attitude as the discharged stocker constitutes a violative threat of discharge. I further find that Vega's repeated asking Barrera if she was fine, and his accompanying statement that he could send Barrera home, constitute a threat of termination violative of the Act. Both statements are directly tied to Barrera's protected concerted activity and were made during the short period between when the pickers engaged in their protected protest and when Vega decided to send Barrera home. Thus, I find that Vega's statements on November 15 would tend to restrain and coerce employees in exercising their Section 7 rights. As such, I find that Vega's statements violate Section 8(a)(1) of the Act.

I have credited Barrera's testimony regarding these two threats. Although these threats were not heard by Gutierrez, I still credit Barrera's testimony. Gutierrez candidly admitted that she did not hear what Vega said to Barrera during their conversations, other than his telling Barrera to go home. (Tr. 73, 81.) For reasons set forth more fully elsewhere in this decision, I do not credit the testimony of Vega. Therefore, based upon the credited testimony of Griselda Barrera, I have found that Respondent violated Section 8(a)(1) of the Act by twice threatening employees with termination for engaging in protected, concerted activities.

C. Respondent Unlawfully Terminates Griselda Barrera

Respondent further violated Section 8(a)(1) of the Act by terminating the employment of Griselda Barrera. I do not find that Barrera's actions on November 15, or on any date thereafter, caused her to lose the protection of the Act.

Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." 29 U.S.C. § 158(a)(1). Rights guaranteed by Section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." 29 U.S.C. § 157. An employee's discharge independently violates Section 8(a)(1) of the Act where it is motivated by employee activity protected by Section 7. Unrepresented employees who engage in a peaceful work stoppage to protest the termination of a fellow employee are engaged in protected concerted activity and an employer who discharges employees for engaging in such activity violates Section 8(a)(1) of the Act. *Robbins Engineering,* 311 NLRB 1079, 1083–1084 (1993). The Board will find that activity is concerted where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of concerns expressed by a group. *Amelio's,* 301 NLRB 182 (1991).

In this case, I find that Barrera's actions were both protected and concerted. I have found that Barrera and the other pickers protested Vega's discharge of Juan. However, as explained above, the Board has found that the action of a single employee in protesting the discharge of another has been found to constitute concerted activity. At a minimum, Barrera was seeking to incite group action. She told Vega that his treatment of Juan was unfair. Her intent to incite group action is obvious from Vega's written statement that Barrera was disrupting production by "getting the ladies in the line worked up" about "standing up against . . . the injustice we were committing." (R. Exhs. 8 and 15.)

Furthermore, I find that Barrera was discharged by Respondent. The Board has long held that the fact of discharge does not depend upon the use of formal words of firing. *Hale Mfg. Co.,* 228 NLRB 10, 13 (1977), enfd. 570 F.2d 705 (6th Cir. 1978). It is sufficient if the words or actions of the employer would lead a prudent person to believe that his or her tenure had been terminated. *Ridgeway Trucking Co.,* 243 NLRB 1048, 1048–1049 (1979), enfd. in relevant part 622 F.2d 1222, 1224 (5th Cir. 1980). Barrera was never told she was terminated. The credited evidence establishes that Barrera was initially told to go home for the day. However, in a later exchange with Respondent's agent, Amaya, Barrera was told not to return to work. A direction not to return to work is a discharge. *Action Carting Environmental Services,* 354 NLRB 732 (2009). Barrera was never subsequently told that she could return to work or seek assignments at some other facility. Therefore, I find that Barrera was discharged by Respondent on November 15.

Although Respondent claims it discharged Barrera for insubordinate behavior, the Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and

defiant. *Goya Foods, Inc.,* 356 NLRB No. 73, slip op. at 4 (2011), citing *Severance Tool Industries,* 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992). In *Goya Foods,* an employee who initially refused a supervisor's instruction to punch out and go home, but then complied after a few minutes, was found to have engaged in the latter and, therefore, to fall under the Act's protection. Id.; see also *Noble Metal Processing, Inc.,* 346 NLRB 795 (2006). The Board has held that on-the-job work stoppages of significantly longer duration remained protected. *Crowne Plaza LaGuardia,* 357 NLRB No. 95, slip op. at 6 (2011), citing *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 202 fn. 8, and 11 (2009), adopted by 355 NLRB 602 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with the hotel's operations). In this case, Barrera and the other pickers engaged in a momentary exchange with Vega. None of the credited evidence establishes that Barrera raised her voice, used profane language, or uttered threats. Thus, I find that Barrera's behavior was not truly insubordinate and that her momentary refusal to return to work did not remove her from the Act's protection. Moreover, I find that her brief work stoppage to incite the remainder of the pickers to action remained protected. Thus, Respondent's arguments fail.

Respondent has asserted that Barrera's behavior on November 15 was unprotected. When an employee is disciplined or discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America,* 338 NLRB 20 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst or alleged misconduct; and (4) whether the conduct was provoked by an employer's unfair labor practice. *Standard Hotel,* 344 NLRB 558, 558 (2005), citing *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979).

The *Atlantic Steel* factors weigh in favor of my finding that Barrera did not forfeit the protection of the Act. The discussions at issue took place in the picker's work area at ReaderLink, a location in which Respondent's employees were assigned to work. The Board has held that an employee's outburst against a supervisor in a place where other employees could hear it would tend to affect workplace discipline by undermining the authority of the supervisor. *Kiewit Power Constructors Co.,* 355 NLRB 708 (2010). The Board has held that when a supervisor makes statements to an employee on the shop floor he should expect that other employees will react and an employee's outburst in response to such a public display retains the protection of the Act. Id. Like the supervisor in *Kiewit Power Constructors,* Vega chose to send Juan home while on the shop floor and, thus, should have expected the reaction of Barrera and the other employees. Therefore, I find that the first *Atlantic Steel* factor weighs in favor of protection.

The second *Atlantic Steel* factor also weighs in favor of protection. The subject matter of the discussion was Respondent's decision to discharge another employee. As the Board found in *Robbins Engineering,* supra, unrepresented employees who engage in a peaceful work stoppage to protest the termination of a fellow employee are engaged in protected concerted activity. The pickers felt that Vega's action in discharging Juan was unfair because of the heavy workload. Thus, Barrera's actions relate directly to the employees' working conditions. Accordingly, I find that the second *Atlantic Steel* factor weighs in favor of protection.

The third *Atlantic Steel* factor, the nature of Barrera's outburst, also weighs in favor of protection. In assessing whether an employee's protected, concerted activity loses the protection of the Act, the Board has found that a line "is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products Co.,* 205 NLRB 51, 51–52 (1973). In this instance Barrera's behavior was not exuberant or hostile. The credited testimony of Barrera and Gutierrez establishes that Barrera did not raise her voice or threaten Vega; nothing about her outburst renders her unfit for further service. Therefore, I find that the third *Atlantic Steel* factor weighs in favor of protection.

The fourth *Atlantic Steel* factor does not weigh in favor of protection. Barrera's outburst was motivated by what Barrera and the other pickers viewed as Respondent's unfair treatment of another employee. However, the lawfulness of Vega's treatment of Juan is not before me, and I cannot find that it constitutes an unfair labor practice. The Board has found that an outburst provoked by statements or conduct not deemed unlawful weigh slightly against retaining the Act's protection. *Tampa Tribune,* 351 NLRB 1324, 1325 (2007), citing *Verizon Wireless,* 349 NLRB 640 (2007). Thus, the fourth *Atlantic Steel* factor does not weigh in favor of protection. Nevertheless, this leaves me with three of the four *Atlantic Steel* factors weighing heavily in favor of protection. Therefore, I find that Barrera's behavior on November 15 did not forfeit the protection of the Act.

Furthermore, even assuming arguendo that Barrera referred to Vega as a secretary or nobody, threatened to report him to immigration officials, and stated that he always takes the supervisor's side, as alleged by Respondent, she would still retain the Act's protection. (See R. Br. at 14.) The Board has held protected an employee's use of profane language and refusal to return to work. *Postal Service,* 251 NLRB 252 (1980), enfd. 652 F.2d 409 (5th Cir. 1981); see also *Lana Blackwell Trucking, LLC,* 342 NLRB 1059, 1062 (2004) (remarks did not lose protection even though a manager subjectively believed that the employee was rude, disrespectful, and embarrassed her in front of other employees). Thus, even had I found that Barrera had uttered the remarks attributed to her by Respondent, I would still find that her behavior retained the protection of the Act.

In its brief, Respondent analyzes the discharge allegation using the burden shifting approach set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 395 (1983). A

Wright Line analysis seems unnecessary, as the reason set forth in Barrera's discharge in its computer system and statement to IDES show that she was terminated for engaging in protected concerted activity. (R. Exhs. 8 and 15.) However, even using the burden-shifting framework of *Wright Line,* I find that Respondent's discharge of Barrera violates the Act.

In *Wright Line,* the Board determined that the General Counsel carries the initial burden of persuading by a preponderance of the evidence that an employee's protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. The elements required for the General Counsel to meet his initial burden are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). If the General Counsel meets that burden, then the burden shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. *Wright Line,* 251 NLRB at 1089; *NLRB v. Transportation Management Corp.,* 462 U.S. at 399–403. Once the General Counsel has met his initial burden under *Wright Line,* an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T & J Trucking Co.,* 316 NLRB 771 (1995); *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996).

Counsel for the General Counsel has met her initial burden under the *Wright Line* test. I have found the activities of Barrera were both protected and concerted. The Board, with court approval, has construed the term "concerted activities" to include those circumstances where individual employees seek to initiate or induce group action, as well as individual employees bringing truly group concerns to the attention of management. *Meyers Industries,* 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); see also *NLRB v. City Disposal Systems,* 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing, as an example, a lone employee who intends to induce group activity). As set forth more fully above, I have found that Barrera was engaged in protected concerted activity and that Vega had direct knowledge of this activity. Barrera was voicing group concerns, or, at a minimum, seeking to induce group action. Thus, the General Counsel has established that Barrera engaged in protected, concerted activity and that Respondent had knowledge of that activity.[19]

The Board relies on both circumstantial and direct evidence in determining whether the conduct in question was unlawfully motivated. *Fluor Daniel, Inc.,* 311 NLRB 498 (1993). Improper motivation may be inferred from several factors, including pretextual and shifting reasons given for an employee's discharge and the timing between an employee's protected activity and the discharge. *Temp Masters, Inc.,* 344 NLRB 1188, 1193 (2005).

Several factors establish that Barrera's discharge was motivated by her protected activity. In its own summary of the events surrounding Barrera's termination, Respondent stated that it discharged Barrera because she got the "ladies in the line worked up" about what she asserted were legal violations and injustice. (R. Exhs. 8 and 15.) Clearly these references are little more than code for Barrera's protected, concerted activity. This evidence links Respondent's decisions to send Barrera home and ultimately discharge her to Barrera's protected, concerted activity and establishes that this activity motivated her discharge.

The timing of Barrera's discharge also supports a finding of improper motivation. Barrera was terminated shortly after her protest of Vega's discharge of Juan. In fact, Barrera was sent home almost immediately after this incident, and then told not to return to work later that same day. Thus, the timing of Barrera's discharge shows that it was motivated by her protected activity.

Furthermore, Respondent's multiple and shifting justifications for its termination of Barrera provide evidence of its unlawful motive. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify' its unlawful conduct." *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB,* 703 F.2d 363, 372 (9th Cir. 1983). See also *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action). Respondent advanced a multitude of reasons for its discharge of Barrera in its statements to IDES and the General Counsel during the investigation of the charges underlying this case, and in its answers to the complaint and brief. Respondent has asserted: Barrera was not terminated; if Barrera was terminated, she was terminated by ReaderLink; Barrera could not have been terminated because Vega lacked the authority to terminate her; if Respondent did terminate Barrera, it was justified in doing so because she was either insubordinate or failed to return to work after being sent home; and if Barrera was terminated, Respondent did not violate the Act because either Barrera was not involved in protected, concerted activity, or if she was involved in protected, concerted activity it was not the motivation for her discharge. The defense regarding Vega's authority to terminate employees was raised for the first time at the trial of this case. I find that Respondent's multiple defenses provide evidence of its unlawful motive in terminating Barrera. Therefore, I find that the General Counsel has met his initial burden of persuasion under *Wright Line.*

Respondent has not shown that it would have discharged Barrera in the absence of her protected conduct. On brief, Respondent asserts it was justified in terminating Barrera based on her: (1) insubordinate and abusive behavior on November 15; (2) refusal to meet with Vega on November 16; and (3) son's harassing and threatening phone calls to Vega. (R. Br. 49–50.)

[19] Even Vega's version of events supports a finding that Barrera's actions were both protected and concerted. Vega testified that he and Perez observed Barrera talking to other pickers after Vega walked Juan off the work floor. (Tr. 244.) Vega then approached Barrera and the others and asked if there was a problem, to which Barrera replied, "Why did you send that stocker home." (Tr. 247.) Vega's reply, "that has nothing to do with you girls" was made to the group and indicates that Barrera was raising a group concern.

I have already found that Barrera's behavior on November 15 was not so insubordinate or abusive as to cost her the protection of the Act. I can find no authority to support Respondent's assertion that Barrera should have been discharged for the alleged phone messages of her son subsequent to November 15. The messages were not preserved, or transcribed, or offered as evidence at the trial. The testimonial evidence produced by Respondent regarding these calls was not sufficient to carry Respondent's burden under *Wright Line.*

Additionally, Respondent's attempt to qualify Barrera's discharge by asserting that Barrera could come and talk to Vega about it, does not alter the nature of Respondent's action. A direction not to return to work is a discharge. *Action Carting Environmental Services,* 354 NLRB 732 (2009). Attempting to place the burden on Barrera to come and speak to the person who discharged her does not negate the discharge. Thus, I find that Respondent has failed to carry its burden.

Furthermore, I do not find that any of the events following Barrera's discharge have disqualified her from reinstatement. Respondent cites no case law, and I can find none, standing for the proposition that Barrera may have either lost the protection of the Act or become ineligible for reinstatement based upon the actions of a third party. As such, I decline to find that any telephone messages left by Barrera's son on Vega's voicemail disqualify her from reinstatement.

D. Respondent's Affirmative Defenses

Respondent asserted eight affirmative defenses in its amended answer to the complaint. (GC Exh. 1(k).) I have rejected Respondent's defense that the complaint failed to state a cause of action by my findings herein. I have also rejected Respondent's argument that it would have taken the same action against Barrera absent her protected, concerted activity. Furthermore, to the extent Respondent argues equitable defenses of unclean hands and estoppel, the Board has refused to recognize these defenses in its proceedings. *Goodyear Tire & Rubber Co.,* 271 NLRB 343, 346 (1984).

Other than Vega's uncorroborated statements, Respondent provided no evidence that the decision to DNR Barrera was caused by ReaderLink. Respondent did not call Perez as a witness. Furthermore, I have found that the direction to Barrera not to return to work was given by Vega. As I have not credited Vega's testimony, I decline to find that ReaderLink caused Barrera's discharge.

Respondent further asserts that the complaint should be dismissed to the extent that it is based on decisions issued by an improperly constituted Board. See *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014). Respondent does not identify to which Board decisions it is referring. None of the cases cited in this decision were issued by the *Noel Canning* Board. Thus, this affirmative defense is rejected.

Respondent raises Barrera's alleged failure to mitigate damages as an affirmative defense. This defense is rejected to the extent that it does not provide a valid defense to Barrera's discharge and to the extent it may provide a defense to the amount of backpay owed, it may be raised at the compliance stage of the proceeding. See *Great Lakes Oriental Products,* 283 NLRB 99 (1987). In a related vein, Respondent asserts an affirmative defense that no backpay or reinstatement are owed, based on the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB,* 535 U.S. 137, 1512 (2001). Evidence of the discriminatee's immigration status may properly be considered at the compliance stage of the proceedings. See *Concrete Form Walls, Inc.,* 346 NLRB 831, 836 (2006). Thus, I leave this affirmative defense for later proceedings.

Respondent presented no evidence supporting its other affirmative defenses at the hearing and the affirmative defenses were not raised in Respondent's brief. As Respondent seems to have abandoned these remaining affirmative defenses, I will not address them further.

None of Respondent's affirmative defenses has merit under the facts as I have found them. Therefore, I find that Respondent violated the Act by twice threatening its employees with discipline for engaging in protected concerted activity and by discharging Griselda Barrera.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act when it terminated the employment of Griselda Barrera on about November 15, 2012.
3. Respondent violated Section 8(a)(1) of the Act when it twice threatened employees with termination for engaging in protected, concerted activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged employee Griselda Barrera, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

For all backpay required here, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

Further, Respondent shall be required to remove from the personnel file of Griselda Barrera any reference to her unlawful termination, and advise her in writing that this has been done. In addition, Respondent shall be required to cease and desist from engaging in unlawful discriminatory conduct and to post an appropriate notice, attached hereto as an "Appendix." Although it appears that Respondent employs a large number of Spanish speaking employees (all of the General Counsel's witnesses testified with the assistance of a Spanish-language interpreter), no party requested that the notice be posted in both

English and Spanish. Therefore, I will not order that the notice be posted in Spanish. See *First Student, Inc.,* 359 NLRB No. 12, slip op. at 3 fn. 2 (2012) (Board deletes the portion of the judge's order requiring notice posting in Spanish because no party requested a Spanish-language notice).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Staffing Network Holdings, LLC, Itasca, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected, concerted activity.

(b) Threatening employees with discharge for engaging in protected, concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Griselda Barrera full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Griselda Barrera whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(d) Compensate Griselda Barrera for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Itasca, Illinois, and its ReaderLink facility in Romeoville, Illinois, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 2012.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 17, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with discharge for engaging in protected, concerted activity.

WE WILL NOT terminate any employee for engaging in concerted activities protected under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Griselda Barrera full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Griselda Barrera whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Griselda Barrera for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Griselda Barrera, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

STAFFING NETWORK HOLDINGS, LLC